MOTION FILED
AUG 9 1982

No. 82-33

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
and
UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, the American Mining Congress (AMC) moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by The Helen Mining Company and Kentland-Elkhorn Coal Corporation July 8, 1982.

Petitioners Helen Mining Company and Kentland-Elkhorn Coal Corporation have consented to this filing as has the federal respondent through the Solicitor General of the United States. These consents are attached as Appendices A and B to the brief. Counsel for Respondent, United Mine Workers of America, has refused consent. AMC's request for that consent is attached as Appendix C.

Nature Of Applicant American Mining Congress' Interest and Reasons For Granting Leave To File as *Amicus*

The American Mining Congress (AMC) is an industry association representing the producers of most of the Nation's coal, metals, agricultural and industrial minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, consulting, and financial institutions serving the mining industry. Petitioners Helen Mining Co. and Kentland-Elkhorn Coal Corp. are both member companies of AMC.

Since the issuance of the decision of the District of Columbia Circuit Court of Appeals in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) ("*UMWA*"), the Mine Safety and Health Administration (MSHA) has reverted to its policy of requiring compensation to miners who accompany MSHA inspectors during all enforcement inspections—both those entire mine inspections required by the 1977 Mine Safety and Health Act (four underground and two surface inspections yearly) and numerous "spot inspections" undertaken by MSHA for specific purposes.

Prior to the *UMWA* decision, the independent Federal Mine Safety and Health Review Commission, the

statutorily delegated authority with respect to interpretation of the 1977 Act, had ruled that the 1977 Act and its legislative history restricted compensation—so-called "walkaround pay"—to the regular entire mine inspections mandated by the Act.

Consequently, AMC member companies are presently faced with citations, civil penalties, possible mine closure orders and potential charges of miner discrimination if they do not accede to MSHA's demands that miners be compensated for participation in all enforcement inspections.

The court's decision in *UMWA*, therefore, has far-reaching effects upon all mine operators—coal and non-coal; surface and underground—that transcend the issue of walkaround pay in the particular instances arising in the petitioners' case.

Beyond the issue of walkaround pay is the overriding question of the statutory scheme for distinguishing between administrative enforcement and administrative review of that enforcement as envisioned by Congress in the 1977 Act.

In the instant case, the Circuit Court of Appeals for the District of Columbia has chosen to ignore the policy-making role of the expert and independent Federal Mine Safety and Health Review Commission in favor of deferring to an interpretive memo of the Secretary of Labor that asserted unrestricted rights to walkaround pay for all enforcement inspections.

By doing so, the court has set a pernicious precedent that could well affect all future decisions of the Review Commission respecting mine safety and health law or policy.

AMC and its member companies viewed Congress' separation of enforcement and adjudicative powers between the Secretary of Labor and the Review Commission as a positive step toward unbiased and independent review of unwarranted enforcement actions.

By dismissing the expertise of the Review Commission in matters of law, policy, and general oversight of enforcement activities, the court's decision seriously affects expectations among mine operators who seek independent review before the Commission and its judges on other vital policy issues.

In view of the widespread ramifications for the mining industry owing to the D.C. Circuit Court of Appeals' decision, the American Mining Congress respectfully submits that the accompanying brief *amicus curiae* would be of benefit to the Court both as to its decision whether or not to grant the petition and, if it is granted, as to the merits of the case.

Respectfully Submitted,

HENRY CHAJET, *Counsel of Record*
MICHAEL F. DUFFY, *Of Counsel*
Attorneys for the
American Mining Congress

ISSUES PRESENTED

Whether the Court of Appeals for the District of Columbia erred by using the plain meaning rule to interpret ambiguous statutory language while concurrently ignoring contrary and dispositive legislative history.

Whether the Court of Appeals erred in failing to grant any deference to the decision of the expert and independent Federal Mine Safety and Health Review Commission.*

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* To avoid duplication, AMC has limited its brief to these two critical issues and the major arguments related thereto. However, AMC fully endorses Petitioner's brief and commends to the Court's attention the excellent arguments contained therein.

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UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS

STATEMENT OF INTEREST

Pursuant to Rule 36.3, the American Mining Congress (AMC) files this brief as *amicus curiae* in support of petitioners. Counsel for all parties except the United Mine Workers of America have consented to the filing of this brief.

The American Mining Congress is a national trade association composed of Unitied States companies that

produce most of the Nation's metals, coal and industrial minerals; manufacturers of mining and milling processing machinery, equipment and supplies; and engineering and contracting companies and banks that serve the mining industry. AMC, founded in 1897, was created to serve as both a clearing house for information and a coordinator for action on behalf of the mining industry with regard to matters pending in Congress, the Executive Branch, and independent agencies; and to work for constructive policies that will best enable the mining industry to serve the needs of the Nation.

AMC and its member companies have a profound interest in the legislation interpreted by the court below. If the Petition for a writ is not granted and the decision of the Circuit Court of Appeals for the District of Columbia is not reversed, the interests of AMC and its member companies will be substantially and adversely affected.

STATEMENT OF THE CASE

The 1977 Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (Supp. IV 1980) ("Act" or "1977 Act"), is a comprehensive and detailed scheme for the national regulation of health and safety at *all* mining operations. The Act requires the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect "in its entirety" each underground mine at least four times annually and each surface mine at least two times annually. Section 103(a), 30 U.S.C. § 813(a) ("regular entire mine inspections" or "regular inspections").

The Act also authorizes the Secretary to conduct other inspections in addition to the regular entire mine inspections.

This case involves the interpretation of Section 103(f) of the Act: the right of miners to be compensated for time

spent accompanying MSHA inspectors during their inspections of the Nation's mines.

The Circuit Court of Appeals for the District of Columbia, in a two to one decision, reversed the interpretation of the expert and independent Federal Mine Safety and Health Review Commission (Review Commission), which construed the Act as limiting walkaround pay to regular entire mine inspections.

In calendar year 1980, MSHA conducted 15,148 regular inspections and 78,911 "spot" inspections at coal mines, and 22,555 regular inspections and 9,453 "spot" inspections at noncoal mines during fiscal year 1980.[1] The sheer magnitude of these numbers indicates the profound adverse affect of the circuit court's decision on the mining industry. Mine operators are now faced with citations, civil penalties, possible mine closure orders and potential charges of miner discriminaion if they do not accede to MSHA's demands that miners be compensated for participation in all enforcement inspections.

Unless the petition for writ is granted, the D.C. Circuit Court's decision will have an adverse impact on all mine operators—coal and noncoal; surface and underground—on a scale that transcends the particular circumstances in petitioners' case.

The decision also carries negative implications for other matters of mine safety and health policy affecting mine operators. The Circuit Court of Appeals, in reaching its decision, ignored the policymaking role of the Review Commission and deferred instead to the views of the Secretary of Labor.

---

[1] AMC respectfully requests that the Court take judicial notice of this publicly available MSHA data. See Appendix D.

By dismissing the expertise of the Review Commission, the court calls into question that agency's authority with respect to other vital policy issues affecting the mining industry.

I.A. THE CIRCUIT COURT'S DECISION IS BASED UPON AN UNWARRANTED AND ERRONEOUS INVOCATION OF THE "PLAIN MEANING" RULE

The majority opinion reaches its conclusion that walkaround pay is required for all enforcement inspections by disingenuously finding no ambiguity in Section 103 and then invoking the "plain meaning" rule.

The application of the "plain meaning" rule has been severely restricted by this court. See e.g. *Watt* v. *Alaska*, 451 U.S. 259 (1981). Even if the rule were still favored, the record in this case more than amply demonstrates that Section 103 is indeed ambiguous and in need of clarification through resort to the legislative history.

The ambiguity of Section 103 was recognized first in the Congress, before the passage of the Act:

> Mr. Speaker, before concluding my remarks, I would like to address one aspect of the conference report that seems to be somewhat ambiguous.

Statement of Representative Carl Perkins, 123 Cong. Rec. 35, 410 (Daily Ed. Oct. 27, 1977), reprinted in Sub. Com. on Labor of the Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of The Federal Mine Safety and Health Act of 1977 (1978) ("Legislative History") at 1356-58.

Upon analyzing Section 103, a majority of the Federal Mine Safety and Health Review Commission stated:

> Both parties [the Secretary and Helen Mining Co.] claim that the plain language of the statute

> unambiguously supports their opposing views. We find that the statute is ambiguous and does not clearly favor either position.

Secretary of Labor v. *Helen Mining Co.*, FMSHRC, Docket No. PITT 79-11-P (Nov. 21, 1979), *rev'd sub nom. United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) (hereafter "Helen Mining"). Brief for Petitioner at 55a.

The statutory ambiguity is further exemplified by the separate dissents filed by two other Commissioners. *Id.* at 62a, 73a.

Lastly, even the circuit majority admitted the statutory ambiguity:

> This statutory language [Section 103] is susceptible of three possible interpretations. . . .
>
> . . . .
>
> Although on this issue the statute is not wholly unambiguous. . . .

United Mine Workers of America v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) Brief for Petitioner at 10a, 18a (hereafter "UMWA").

Clearly, the statutory ambiguity exists and the circuit court's invocation of the plain meaning rule was gross error requiring reversal.

I.B. THE CIRCUIT COURT'S DECISION IS AN INFRINGEMENT UPON THE SOLE POWER OF CONGRESS TO LEGISLATE

The separation of powers among the three branches of the Federal government is one of the basic tenets upon which the republic was built. That only Congress can legislate is a principal established by the Constitution and

revered by this Court. See e.g. *Northwest Airlines, Inc.* v. *Transportation Workers Union of America, AFL-CIO*, 451 U.S. 76 (1981).

The circuit court has defied this principle in establishing, by convoluted judicial interpretation, a statutory right which the Congress expressly refused to grant.

First, the circuit court misapplied the plain meaning rule to achieve what it deemed a desirable policy result. Second, the court grossly mischaracterized the Commission's decision by stating that "in reaching its decision, the Commission relied exclusively upon a statement by Rep. Carl Perkins. . . ." *UMWA*, Brief of Petitioner at 11a.

The Commission, on the contrary, began with a detailed analysis of the statute and concluded that it limited walkaround compensation rights. Thereupon, the Commission reviewed the entire legislative history, seeking guidance as to the scope of the limitation on compensation. The Commission stated that:

> [T]he Secretary has not pointed to, nor have we found, a subsequent statement by any conferee or other member of Congress that the walkaround pay right extends beyond regular inspections, or disallowing Mr. Perkins' statement of the conferees intention.

Helen Mining, Brief for Petitioner at 60a.

Chairman Perkins' statement, expressing the clear intent of the conferees, provided unequivocal proof that compensation for walkaround was to be limited to the four underground and two surface regular entire mine inspections required to be made each year.

The circuit court cavalierly dismissed Perkins' statement by asserting that the Commission erroneously re-

lied upon it in light of the "clear and unambiguous" language of Section 103. Yet, paradoxically, the majority opinion buttresses its interpretation by resorting to other portions of the legislative history. These portions of the legislative history fail to address the compensation right with the same specificity as the statement of Rep. Perkins, Chairman of the Conference Committee and Chairman of the House Committee that drafted the House bill, and who, in his remarks as floor manager of the bill, explicitly stated that he was relaying the understanding and intent of the House and Senate Conferees.

The court's overtly selective review of the legislative history is alone ground for reversal. This selectivity is best explained by the words of Judge Tamm in his dissent:

> Although I recognize the attractiveness of the majority's result, I believe it impermissibly crosses the line that divides construction of the statute to effectuate the will of Congress from construction intended to achieve a preferable policy conclusion.

UMWA, Brief for Petitioner at 281.

In one of the original decisions giving rise to this proceeding, Administrative Law Judge Merlin stated the matter succinctly:

> As the Solicitor [of Labor] has persuasively stated, it may be desirable to compensate miner representatives who accompany MSHA inspectors on all inspections. This, however, is not what the Act says. . . . I cannot legislate and neither can the Secretary.

Secretary of Labor v. *Helen Mining Co.*, FMSHRC, Docket No. PITT 79-11-P (Apr. 11, 1979) *aff'd Helen Mining*, Brief for Petitioner at 92a.

AMC respectfully submits that the Circuit Court of Appeals for the District of Columbia should not be permitted to legislate either.

II. THE CIRCUIT COURT'S OPINION RECKLESSLY SKEWS THE REGULATORY AND ADJUDICATORY SCHEME FASHIONED BY CONGRESS IN THE 1977 ACT.

Prior to the passage of the 1977 Act, mine safety and health was regulated by the Secretary of the Interior who was both prosecutor and judge through his enforcement arm, the Mining Enforcement and Safety Administration (MESA) and a surrogate, quasi-judicial body, the Board of Mine Operations Appeals. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* (amended 1977).

When Congress transferred jurisdiction over mine safety and health to the Department of Labor, it acknowledged the inherent unfairness in the prior adjudicatory system. The Federal Mine Safety and Health Review Commission was created as a totally independent judicial agency to serve as an expert neutral arbiter in disputes among MSHA, operators, and miners. *Council of the Southern Mountains* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981).

Congress vested the Commission with authority to pass upon "[s]ubstantial questions of law, policy, or discretion" and explicitly circumscribed the scope of review of Commission decisions by circuit courts of appeals. 30 U.S.C. 823(d)(2)(A)(ii). *Duval Corp.* v. *Donovan*, 650 F.2d 1051 (9th Cir. 1981); *Ziegler Coal Co.* v. *Marshall*, 502 F. Supp. 1322 (D.C. Ill. 1980); *Mid-Continent Coal and Coke* v. *Federal Mine Safety and Health Review Commission*, 2 MSHC 1450 (unreported dec. No. 79-2271 9th Cir. Sept. 24, 1981).

Perhaps the most precise description of the Commission's role is that expressed by Senator Williams, one of the Act's principal authors, on the occasion of the nomination hearing for the five original Commissioners:

> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.

Nomination Hearings, Members of the Federal Mine Safety and Health Review Commission Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978).

In its decision, the circuit court ignored the importance of the Review Commission as the ultimate administrative authority regarding the interpretation of the 1977 Act.

Rather than according due deference to the Commission's policymaking and judicial expertise, the court deferred to the less than impartial enforcing entity, the Secretary of Labor, for guidance in the interpretation of Section 103. This misplaced deference eschews a carefully crafted Congressional enforcement and adjudicative scheme wherein the Secretary is merely one among a number of parties litigant before the wholly independent Review Commission.

Established case law relative to the Commission's counterpart, the Occupational Safety and Health Review Commission, provides conclusive precedent for affording due deference to the interpretive decisions of an independent, quasi-judicial administrative agency. *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir.

1978); *Dunlop* v. *Rockwell International*, 540 F.2d 1283 (6th Cir. 1976); *Brennan* v. *Gilles and Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

The circuit court's decision ignores the Commission's statutory role, fails to accord due deference to the Commission's expertise, and must be reversed.

CONCLUSION

The circuit court's reversal of the Review Commission's decision is based upon a misplaced reliance upon the plain meaning rule. The court further erred by expansively legislating rights that Congress explicitly witheld. Lastly, the court failed to accord proper deference to the policymaking and interpretive expertise granted by Congress to the Review Commission.

For these reasons, petitioners' writ of *certiorari* should be granted and the circuit court's decision should be reversed.

Respectfully submitted,

HENRY CHAJET, *Counsel of Record*
MICHAEL F. DUFFY, *Of Counsel*
Attorneys For The
American Mining Congress

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,

Respondents.

CONSENT OF PARTIES TO THE FILING
OF AN AMICUS CURIAE BRIEF BY
THE AMERICAN MINING CONGRESS

The parties in the above-captioned case consent to the filing of an Amicus Curiae Brief by the American Mining Congress.

Richard McMillan, Jr.
The Helen Mining Company and
Kentland-Elkhorn Coal Corporation

APPENDIX B

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 29, 1982

Michael P. Duffy, Esquire
Henry Chajet, Esquire
American Mining Congress
Suite 300
1920 N Street, N. W.
Washington, D. C. 20036

Re: Helen Mining Company and Kentland-Elkhorn Coal Corporation v. Raymond J. Donovan, Secretary of Labor, et al., No. 82-33

Dear Messrs. Duffy and Chajet:

In response to your letter of July 23, 1982, I hereby consent, on behalf of the federal respondent, to the filing of a brief amicus curiae on behalf of The American Mining Congress (AMC) in this case.

Sincerely,

Rex E. Lee
Solicitor General

APPENDIX C

AMERICAN MINING CONGRESS
SUITE 300
1920 N STREET NW
WASHINGTON
DC 20036
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Officers
Chairman
Charles F. Barber
Vice Chairman and Chairman, Finance Committee
Paul W. Douglas
Vice Chairmen
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Ralph E. Bailey
George B. Munroe
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John A. Love, Denver
Robert W. Hobson, Greenwich
Richard A. Lewis, Norristown IL
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George E. Arwood, Tucson
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Perry Gousseland, Greenwich
A.M. Wilson, San Francisco
Robert H. Quenon, St. Louis
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Thomas Marshall, Pittsburgh
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Richard D. McKinzie, Stamford
Michael A. Murphy, Los Angeles
Charles W. Parry, Pittsburgh
†Raymond F. Talbot, Ft. Lauderdale
Van MacGregor, Greenwich
*Immediate Past Chairman
†Honorary

July 23, 1982

Mr. Harrison Combs
General Counsel
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

RE: The Helen Mining Co., et al.
v. Donovan, et al.
E. Ct. No. 82-33

Dear Mr. Combs:

The American Mining Congress seeks to file a brief as amicus curiae in the above-referenced case in support of the Helen Mining Co.'s and Kentland-Elkhorn Coal Corp.'s petition for a writ of certiorari to the U.S. Supreme Court. It is our intent that, if filed, the brief would also serve as our statement on the merits.

The American Mining Congress (AMC) is an industry association representing the producers of most of the nation's metals, coal, and agricultural and industrial minerals. As such, we have a strong interest in whether the petition is granted as well as in the ultimate disposition of the case.

Accordingly, we request your consent to file this brief. We have enclosed a consent form for this purpose.

Sincerely,

Henry Chajet

Michael F. Duffy

Counsel for the
American Mining Congress

APPENDIX D

U. S. Department of Labor

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

JUL 29 1982

Henry Chajet, Esq.
Senior Counsel
American Mining Congress
Suite 300
1920 N St., NW
Washington, D.C. 20036

Dear Mr. Chajet:

This is in response to your request for a letter containing the latest final annual statistics readily available to the public on regular and other inspections of coal and metal/nonmetal mines.

During calendar year 1980, MSHA's Coal Mine Safety and Health activity conducted 15,148 complete regular inspections, and 78,911 other inspections, at U.S. coal mines. These statistics are derived from tables appended to the testimony of Assistant Secretary for Mine Safety and Health Ford B. Ford before the Subcommittee on Manpower and Housing, Committee on Government Operations, House of Representatives, February 19, 1982.

During fiscal year 1980 (October 1, 1979 through September 30, 1980), MSHA's Metal and Nonmetal Mine Safety and Health activity conducted 22,555 regular inspections and 9,453 compliance followup inspections. These statistics are from MSHA's FY 1980 annual report, which is not yet published but which has been cleared for transmittal by the President to Congress; statistics in this report have been made available to members of the public upon request.

Sincerely,

Samuel A. Stafford (for)

Wayne E. Veneman
Chief, Office of Information